

MEMORANDUM

October 19, 2000

TO: Neil Kaufman, Esq.

FROM: Richard C. Walters, Esq.

RE: Comments Regarding Interagency ADR Working Group Steering
Committee Report on ADR Confidentiality

The purpose of this memorandum is to provide some thoughts as to the above-referenced Report, for possible incorporation within the final version of the document. As a whole, the Report represents an excellent effort by the Confidentiality Subgroup. My comments are aimed at improving a good product. They are directed only at certain of the questions and answers contained in the third Report section and at the proposed "Miranda" type statement for ADR neutrals. For ease of understanding, the questions and answers and "Miranda" type statement are set forth below verbatim, followed by my comments.

QUESTION 5: Who is a neutral?

ANSWER: A neutral is anyone who functions specifically to aid the parties during a dispute resolution process. A neutral may be a private person or a federal government employee who is acceptable to the parties. There may be more than one neutral during the course of a dispute resolution process (e.g., an intake neutral, a convener neutral, as well as the neutral who facilitates a face-to-face proceeding). It is important that agencies clearly identify neutrals to avoid misunderstanding.

The ADR Act supports a broad reading of the term neutral. An intake or convening neutral is included in this definition as an individual who ... functions specifically to aid the parties in resolving the controversy because such neutrals take the necessary first steps toward a potential resolution of a dispute.

In situations where an intake neutral is identified by an agency, a party's willingness to contact and/or work with the intake neutral to initiate an ADR process is an indication that the intake neutral is acceptable to the party. Citation: 5 USC 571(9), 571(6), 571(3), 573(a).

Example: An employee contacts an agency ADR program and describes a dispute to an intake person. The conversation is confidential only if the intake person has been appropriately identified as a neutral by the agency to aid parties in resolving such disputes.

COMMENTS: The answer presumes an understanding that the Act requires neutrals to be acceptable to both parties. This point should be articulated more clearly. It is

suggested that the third paragraph of the answer be modified to read:

Under the ADR Act, a neutral must be “acceptable to the parties.” An agency’s identification of an individual as an intake or convening “neutral” is a clear indication of that person’s acceptability to the agency. A party’s willingness to contact and/or work with the intake neutral or convening neutral to initiate an ADR process likewise is an indication that the neutral is acceptable to that party. Citation 5 U.S.C. 571(9) ; 571(6); 571(3); 573(a).

QUESTION 9: What confidentiality protection is provided for communications by a nonparty participant in a dispute resolution proceeding?

ANSWER: A nonparty participant in a dispute resolution proceeding is an individual other than a party, agent or representative of a party, or the neutral. This could be an individual who is asked by the neutral to present information for use of the neutral or parties. A nonparty participant has an independent right to protect his or her communications from disclosure by a neutral. A neutral needs to obtain the consent of all parties and the nonparty participant to disclose such a the communication. Citation: 5 USC 574(a)(1).

COMMENTS: Editorial change: In the final sentence of the answer, the next to the last word (“the”) should be deleted.

QUESTION 15: Does the ADR Act protect against the disclosure of dispute resolution communications in response to requests by federal entities for such information?

ANSWER: Section 574 of the ADR Act prohibits a neutral or a party from disclosing, voluntarily or in response to discovery or compulsory process, any protected communication. The ADR Act further states that neutrals and parties shall not be required to disclose such communications. However, a number of federal entities have statutory authority to request disclosure of documents from federal agencies and employees. Examples of such statutes include, but are not limited to, The Inspector General Act (5 USC App.); The Whistleblower Protection Act (5 USC Section 1212(b)(2)); and the Federal Service Labor-Management Relations Act (5 USC Section 7114(4)).

None of the exceptions to the ADR Acts confidentiality provisions directly applies to requests for disclosure of information from federal entities. For example, these statutes do not require information to be made public under ADR Act Section 574 (a)(3) & (b)(4). In addition, the judicial override procedure outlined in Section 574 (a)(4) & (b)(5) is not always available to federal entities with authority to access information. Some federal entities may lack jurisdiction to seek a court order to compel disclosure. Other federal entities may have such jurisdiction, but may seek disclosure under other statutory authority.

In summary, a tension between these statutory authorities exists. The issues of statutory interpretation of these differing authorities have not yet been considered in an appropriate forum. We do not anticipate that there will be

many occasions when such requests will be directed to neutrals or participants. However, it is important for agencies, neutrals and participants to be aware of the potential for requests.

In order to prevent unnecessary disputes over requests for information pursuant to an access statute and to mitigate damage to ADR programs, we recommend:

Agency ADR programs should enter into a dialogue with potential requesting entities so that each may be educated about their respective missions.

Procedures should be established for access to information that recognize the importance of confidentiality in dispute resolution processes and protect the integrity of the agency's ADR program.

ADR programs should identify classes of information that are not confidential.

Requesting entities should use non-confidential information as a basis for information requests.

Requesting entities should seek confidential information only after other potential sources have been exhausted.

Requesting entities should seek information from a neutral only as a last resort.

The ADR program and requesting entities should agree to procedures to resolve specific disagreements that arise with regard to the disclosure of information.

If a federal employee party or neutral receives a request for disclosure, he or she should contact the agency's ADR program as soon as possible to discuss appropriate courses of action. Neutrals must also notify parties of any such request (See Question 19).

COMMENTS: To preclude future difficulties, it is recommended that the ADR Council seek and obtain *formal* concurrence of the President's Council on Integrity and Efficiency in the approach suggested by this response. Also, to assure proper coordination with IG offices in terms of future requests for information relating to ADR proceedings, it is recommended that the following language be added to the paragraph beginning "Agency ADR programs should enter into a dialogue ...":

Along these lines, agency ADR and IG offices should devise procedures tailored to the agency's needs and mission, in order to properly process IG requests for information relating to any ADR proceeding.

QUESTION 16: May parties agree to confidentiality procedures which are different from those contained in ADR Act?

ANSWER: Yes. Parties may agree to more, or less, confidentiality protection for disclosure by the neutral or themselves than is provided for in the Act.

Subsection 574(d)(1) provides that the parties can agree to alternative confidential procedures for disclosures by a neutral. While there is no parallel provision for parties, the exclusive wording of this subsection should not be construed as indicating Congressional intent to limit alternative procedures by parties. Parties have a general right to sign confidentiality agreements, and there is no reason this should change in a mediation context.

If the parties agree to alternative confidentiality procedures regarding disclosure by a neutral, they must so inform the neutral before the dispute resolution proceeding begins or the confidentiality procedures in the ADR Act will apply. An agreement providing for alternative confidentiality procedures is binding on anyone who signs the agreement. (See Questions 23 and 24 for potential FOIA implications.)

Example: Parties to an ADR proceeding can agree to authorize the neutral to use his or her judgment about whether to voluntarily disclose a protected communication, as long as the neutral is informed of this agreement before the ADR proceeding commences.

Example: Parties to an ADR proceeding can agree that they, and the neutral, will keep everything they say to each other in joint session confidential.

COMMENTS: The answer does not make sufficiently clear that an agreement for alternative confidentiality procedures, though binding on signatories, will not bind third parties and will not serve to protect the ADR participants from disclosure of confidential ADR communications to those parties. It is therefore recommended that the third paragraph be revised to read:

If the parties agree to alternative confidentiality procedures regarding disclosure by a neutral, they must so inform the neutral before the dispute resolution proceeding begins or the confidentiality procedures in the ADR Act will apply. An agreement providing for alternative confidentiality procedures is binding on anyone who signs the agreement. *On the other hand, such an agreement will not be binding on third parties and may not guarantee that an ADR communication will be protected by the ADR Act from disclosure to such parties.* (See Questions 23 and 24 for potential FOIA implications.)

QUESTION 17: What restrictions are put on the use of confidential communications disclosed in violation of the ADR Act?

ANSWER: If the neutral or any participant discloses a confidential communication in violation of Sections 574(a) or (b), that communication may not be used in any proceeding that is related to the subject of the dispute resolution proceeding in which the protected communication was made. A dispute resolution communication that was improperly disclosed may not be protected from use in an unrelated proceeding. Citation: 5 U.S.C. 574(c).

COMMENTS: The concepts of “related” and “unrelated” are unclear. The inclusion of examples would be helpful.

QUESTION 18: What is the penalty for disclosing confidential communications in violation of the statute?

ANSWER: The ADR Act does not specify any civil or criminal penalty for the disclosure of a protected communication in violation of the Act. However, such disclosure may violate other laws, regulations or agreements of the parties.

COMMENTS: It is suggested that the following be added to the second sentence of the answer, for the sake of clarity: “that provide for such penalties.”

QUESTION 20: What can/must parties do when they receive notice of a demand for disclosure from the neutral?

ANSWER: If a party has no objection to the disclosure of confidential communications, it need not respond to the notice. On the other hand, if a party believes that the sought-after communications should not be disclosed, it should notify the neutral and make arrangements to defend the neutral. Where the party is a federal agency, it should develop departmental procedures for processing the notice.

COMMENTS: The last sentence of the answer is unclear regarding when an agency is to develop departmental procedures. These should not be formulated on an emergency or *ad hoc* basis. Accordingly, it is suggested that the sentence be deleted and the following substituted:

Federal agencies should develop departmental procedures for responding to such notices.

QUESTION 21: What responsibilities do agencies have for ensuring that the notification requirement is met?

ANSWER: In some federal ADR programs, the neutral may be a federal employee performing collateral duty. Imposing an obligation upon these neutrals to keep records of parties to dispute resolution proceedings may be unduly onerous and ineffective. Agencies should develop administrative procedures to assure that the notification functions are fulfilled.

COMMENTS: The Act does not exempt neutrals who perform their functions as neutrals as “collateral duty.” Any neutral receiving a demand for information must comply with the statutory obligation to notify the parties of that demand. If this obligation is too onerous for a part-time agency neutral, it may indicate the need for the agency to create full-time positions for its neutrals. My recommendation is that the question and answer be deleted.

QUESTION 24: If parties agree to alternative confidentiality procedures, are dispute resolution communications subject to FOIA?

ANSWER: Parties may agree to confidentiality procedures that differ from those provided for in the ADR Act. Parties should be aware, however, that the FOIA exemption may not apply to all the communications protected under their agreement.

If the agreement provides for the same or more disclosure than provided by the Act, dispute resolution communications are exempt from disclosure under FOIA. If the agreement provides for less disclosure, communications are not exempt from disclosure under FOIA. The ADR Act, in effect, establishes a ceiling on the extent to which confidential communications will be exempt. Parties cannot contract for more FOIA protection than the ADR Act provides.

COMMENTS: The first two sentences of the second paragraph are confusing. I would recommend that they be deleted.

V. MODEL CONFIDENTIALITY STATEMENT FOR USE BY NEUTRALS

The confidentiality provisions of the Administrative Dispute Resolution Act (ADR Act) apply to this process. Generally, if you tell me something during this process, I will keep it confidential. The same is true for written documents you prepare for this process and give to me. [Similarly, you are generally required to keep information confidential that you receive during conversations with other parties or me and from writings prepared for this process.]*

Be advised, there are limits on our ability to keep information confidential. If you say something or provide documents to all the other parties it is not confidential. Under rare circumstances, a judge can order disclosure of confidential information. Even though not required by the ADR Act, information about a violation of criminal law, or an act of fraud, waste, or abuse, or an imminent threat of serious harm may have to be disclosed to appropriate authorities by a participant, but not necessarily by me.

You can agree to more confidentiality if you want to. For example, you can agree to keep confidential things you share with all the parties. If you want to do any of that, it will require the agreement of all parties and should be memorialized in writing. You should be aware that if you agree to more confidentiality, written documents may still be available to others, for example, through the Freedom of Information Act. Confidentiality provisions other than those in the ADR Act may also apply to this process.

- Include for multi-party disputes

COMMENTS: As to the above “Miranda” type statement, its tone would be tend to discourage participation in an ADR process. Rather than a prescribed “Miranda” type statement, it is suggested that guidance to neutrals be furnished as part of an additional question and answer:

QUESTION: What should a neutral advise ADR participants regarding the extent of confidentiality in an ADR involving a federal agency?

ANSWER: A neutral may wish to say that the intent of ADR is to provide confidentiality for dispute resolution, but that absolute confidentiality cannot be guaranteed and that certain exceptions to it exist. In this regard, the parties could be referred to the ADRA as well as to the guidance furnished in the Report.